Highceed Corp Sdn Bhd v Warisan Harta Sabah Sdn Bhd & Anor

HIGH COURT (KOTA KINABALU) — SUIT NO K 22–283 OF 1998
RICHARD MALANJUM J
18 JANUARY 2000

Civil Procedure *— Summary judgment — Triable issues — Existing counterclaim — Whether summary judgment may be given — Rules of the High Court 1980 O 14*

Contract *— Building contract — Implied term — Intention of parties — Whether parties intended economic downturn as factor for termination of contract*

Contract *— Frustration — Whether doctrine of frustration successfully raised — Economic crisis — Whether rendered project radically different from that undertaken by buliding contract*

The first defendant had appointed the plaintiff as a contractor to carry out the construction of a commercial building complex ('the project') and a building contract was signed. The plaintiff also procured a performance bond in favour of the first defendant issued by the second defendant and took out an Insurance Guarantee against Advance Payment (for works) issued by the second defendant in favour of the first defendant. The plaintiff then took possession of the site. By a letter dated 26 January 1998, the first defendant indicated to the plaintiff its intention of either to extend the period of completion of the project or to stop work and to compensate the plaintiff for the costs it had incurred so far. Then by a letter dated 16 July 1998 ('the stop work order'), the project consultant, M/s Arkitek Ikhtisas Sdn Bhd instructed the plaintiff to stop work immediately. In response to the stop work order, the plaintiff informed the project consultant of its decision to treat the building contract as 'having been determined' by the first defendant. It also gave notice of its intention to submit its claim for all losses and damages suffered by it by reason of the termination. By a letter dated 8 October 1998 to the plaintiff, the first defendant wrote, inter alia, that the stop work order was of a permanent nature. By its letter dated 31 December 1998, the plaintiff submitted its claim for the works done as directed in the stop work order. The plaintiff then applied for summary judgments against the defendants. The issues were, inter alia: (i) whether the stop work order repudiated the building contract; (ii) whether the first defendant can rely on an implied term/cl 11 of the building contract that in the event of any financial or economic crisis happening, the first defendant should be entitled to terminate the plaintiff's employment; and (iii) whether the doctrine of frustration applies.

Held, allowing the plaintiff's application for summary judgment:

(1) A stop work order issued by the first defendant effectively repudiated the building contract as the first defendant in no

uncertain term made it clear that the stop work order would be of a permanent nature (see p 346A).

(2) There is no specific provision in the building contract relating to economic downturn as a reason for an issuance of a stop work order. It is also not specifically stated as one of the grounds for terminating the building contract (see p 346B–C). Further, the stop work order does not fall within the ambit of cl 11 as it is not wide enough to include the omission of the balance of the works in the project thereby effectively terminating the building contract (see p 350D).

(3) The court could not infer that the parties to the building contract must have intended to include economic downturn as a factor that could be a basis for the repudiation of the building contract. The generally accepted subjective tests whereby a term would be implied by the court, ie the test of business efficacy and also based on custom or usage of any market or trade, were not satisfied. Moreover, it is inconceivable that, for a project of this magnitude, the parties would have left such a crucial matter to be implied (see pp 348H–349B); *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 followed. Hence, the reliance on implied term principled by the first defendant as a justification in the issuance of the stop work order fails and the court finds no triable issue arising thereof (see p 349B–C)

(4) The doctrine of frustration does not apply. There is no question of absence of default by either party as it was by choice of the first defendant not to proceed with the project. Furthermore, there is no material indicating that the economic crisis has the effect of rendering the construction of the project radically different from that that was undertaken by the building contract (see p 350A–C). As for the counterclaim of the first defendant, it does not necessarily provide a triable issue as summary judgment may still be given notwithstanding the filing of a counterclaim (see p 351D).

[Bahasa Malaysia summary

Defendan pertama telah melantik plaintif sebagai kontraktor untuk menjalankan satu pembinaan sebuah bangunan kompleks perdagangan ('projek tersebut') dan satu kontrak pembinaan telah ditandatangani. Plaintif juga mendapat satu bon pelaksanaan yang menyebelahi defendan pertama yang telah dikeluarkan oleh defendan kedua dan mengeluarkan satu Insuran Jaminan terhadap Bayaran Pendahuluan (untuk kerja-kerja) yang telah dikeluarkan oleh defendan kedua yang menyebelahi defendan pertama. Plaintif kemudiannya telah mengambil milikan ke atas tapak pembinaan tersebut. Melalui sepucuk surat bertarikh 26 Januari 1998, defendan pertama telah menyatakan kepada plaintif tentang niatnya untuk sama ada melanjutkan tempoh penyelesaian projek tersebut atau memberhentikan kerja

dan memberikan pampasan kepada plaintif bagi kos yang ditanggung setakat ini. Selepas itu, melalui sepucuk surat bertarikh 16 Julai 1998 ('perintah pemberhentian kerja'), konsultan projek tersebut, M/s Arkitek Ikhtisas Sdn Bhd telah mengarahkan plaintif untuk memberhentikan kerja serta-merta. Sebagai respon kepada perintah pemberhentian kerja tersebut, plaintif telah memberitahu konsultan projek tersebut tentang keputusannya untuk menganggap kontrak pembinaan tersebut sebagai 'telah pun ditentukan' oleh defendan pertama. Ia juga telah memberikan notis tentang niatnya untuk mengemukakan tuntutannya terhadap semua kerugian dan ganti rugi yang dialami olehnya yang disebabkan oleh penamatan tersebut. Melalui sepucuk surat bertarikh 8 Oktober 1998 kepada plaintif, defendan pertama telah menulis, antara lain, bahawa perintah pemberhentian kerja tersebut adalah bersifat kekal. Melalui sepucuk surat bertarikh 31 Disember 1998, plaintif telah mengemukakan tuntutannya berhubung kerja yang telah dilakukan sebagaimana yang diarahkan di dalam perintah pemberhentian kerja tersebut. Plaintif kemudiannya telah memohon penghakiman terus terhadap defendan-defendan. Isu-isu yang diutarakan, antara lain, adalah: (i) sama ada perintah pemberhentian kerja tersebut mengingkari kontrak pembinaan tersebut; (ii) sama ada defendan pertama boleh bergantung kepada terma tersirat/ fasal 11 kepada kontrak pembinaan tersebut bahawa sekiranya apa-apa krisis kewangan atau ekonomik berlaku, defendan pertama sepatutnya berhak untuk menamatkan pekerjaan plaintif; dan (iii) sama ada doktrin kekecewaan terpakai.

Diputuskan, membenarkan permohonan plaintif untuk penghakiman terus:

(1) Satu perintah pemberhentian kerja yang dikeluarkan oleh defendan pertama dengan berkesannya telah mengingkari kontrak pembinaan kerana defendan pertama tidak di dalam apa-apa cara telah menjelaskan bahawa perintah pemberhentian kerja tersebut akan bersifat kekal (lihat ms 346A).

(2) Tiada peruntukan spesifik di dalam kontrak pembinaan tersebut yang berhubung dengan kemelesetan ekonomi sebagai satu sebab perintah pemberhentian kerja tersebut dikeluarkan. Ia juga tidak dinyatakan secara spesifik sebagai salah satu daripada alasan untuk menamatkan kontrak pembinaan tersebut (lihat ms 346B–C). Tambahan pula, perintah pemberhentian kerja tersebut tidak jatuh di bawah lingkungan fasal 11 kerana ia tidak begitu luas untuk memasukkan peninggalan baki kerja-kerja projek tersebut yang dengan berkesannya menamatkan kontrak pembinaan tersebut (lihat ms 350D).

(3) Mahkamah tidak boleh membuat inferens bahawa pihak-pihak kepada kontrak pembinaan sememangnya berniat untuk memasukkan kemelesetan ekonomi sebagai satu faktor yang boleh menjadi asas untuk menolak kontrak pembinaan tersebut. Ujian-ujian subjektif yang biasanya diterima di mana satu terma akan

dinyatakan secara tersirat oleh mahkamah, iaitu ujian keberkesanan perniagaan dan juga berdasarkan kepada kebiasaan atau penggunaan apa-apa pasaran atau dagangan, tidak dipenuhi. Tambahan pula, tidak dapat dibayangkan bahawa, satu projek sebegini besar, pihak-pihak akan tertinggalkan satu perkara penting untuk dinyatakan secara tersirat (lihat ms 348H–349B); *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 diikut. Justeru itu, kebergantungan terhadap satu terma tersirat yang berprinsipkan oleh defendan pertama sebagai satu justifikasi di dalan pengeluaran perintah pemberhentian kerja tersebut telah gagal dan mahkamah mendapati tidak tiada isu-isu yang perlu didengar yang timbul daripadanya (lihat ms 349B–C).

(4) Doktrin kekecewaan tidak terpakai. Tidak wujud persoalan mengenai ketiadaan kegagalan daripada kedua-dua belah pihak kerana defendan pertama telah membuat pilihan untuk tidak meneruskan projek tersebut. Tambahan pula, tiada material yang menunjukkan bahawa kemelesetan ekonomi mempunyai kesan yang menyebabkan pembinaan projek tersebut mempunyai perbezaan radikal daripada apa yang telah dilaksanakan oleh kontrak pembinaan tersebut (lihat ms 350A–C). Berhubung dengan tuntutan balas defendan pertama, tidak menjadi keperluan untuk wujud satu isu yang perlu didengar kerana penghakiman terus mungkin masih boleh diberikan walaupun tuntutan balas tersebut difailkan (lihat ms 351D).]

Notes

For cases on triable issues, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4684–4740.

For a case on implied terms, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) para 2491.

For cases on frustration due to cancellation of project, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) para 2218.

Cases referred to

Davis Contractors v Fareham UDC [1956] 2 All ER 145 (refd)

National Company for Foreign Trade v Kayu Rava Sdn Bhd [1984] 2 MLJ 300 (refd)

Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan [1993] 2 MLJ 423 (refd)

Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v Ghazali bin Ibrahim [1985] 2 MLJ 225 (refd)

Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151 (folld)

Legislation referred to

Rules of the High Court 1980 O 14 r 1

A *Henri Cheu* (*Jeffrey Chu* with him) (*Jeffrey Chu & Co*) for the plaintiff.
Jainab Ahmad (*Jainab & Associates*) for the defendants.

Cur Adv Vult

Richard Malanjum J:

B

Introduction

By way of summon in chambers dated 1 December 1998 the plaintiff is applying under O 14 r 1 of the Rules of the High Court 1980 for the following relief, to wit:

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(a) A declaration that the first defendant has wrongfully repudiated the building contract dated 17 January 1998 and has thereby prevented the plaintiff from repaying the advance payment of RM5m in accordance with the terms of the advance payment and/or satisfying the terms of the insurance guarantee against advance payment (for works) issued under Policy No N–7–97–TA-000002;

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(b) A declaration that the first defendant has wrongfully repudiated the building contract dated 17 January 1998 and has thereby prevented the plaintiff from completing its performance of the building contract;

(c) Damages to be assessed; and

(d) Costs.

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In support of the application the plaintiff filed an affidavit in support affirmed by Mr Lim Ching On on 1 December 1998 (Lim's first affidavit).

The defendant is objecting to the application and has therefore filed an affidavit in opposition affirmed by Datuk Hj Matiasin Surai on 6 April 1999 (Matiasin's first affidavit). A further affidavit was also filed on 28 April 1999
F (Matiasin's second affidavit).

Subsequently, the plaintiff filed an affidavit-in-reply affirmed by Mr Lim Ching On on 20 April 1999 (Lim's affidavit-in-reply).

The relevant and undisputed facts

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By a letter of award dated 12 August 1997 ('letter of award'), the first defendant appointed the plaintiff as a contractor to carry out the construction of a commercial building complex on a parcel of land situated in Kota Kinabalu under PT2 of Title Deed No TL 017533881 for a contract sum of RM175m. The project was described as a 'Proposed office
H development consisting of 12, 8 and 13 storey for banking, office and restaurant with 1 level sub-basement and one level basement car park and four levels elevated car park (with subsidiary (strata) titles to be applied for) ('the project'). The period of completion was scheduled for 24 months from the date of possession of site. Subsequently, a building contract was signed on 17 January 1998 ('the building contract').

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There was another agreement signed between the plaintiff and the first defendant called the marketing agreement dated 13 August 1997 ('the marketing agreement').

Pursuant to the letter of award the plaintiff procured a performance bond for RM8.75m in favour of the first defendant issued by the second defendant under Policy No N–7–97–TA–000001 dated 31 December 1997 ('the performance bond'). A

And in approving an advance of RM5m ('the advance') to the plaintiff the first defendant stipulated conditions, inter alia: B

(a) the special provisions to the conditions of contract (additional terms and conditions) as per attachment I; and

(b) the provision of a bank guarantee against advance payment as per proforma attached.

And paras 7 and 8 of Lim's first affidavit described the mode of recouping the advance and the termination of the bank guarantee as thus: C

7 The advance payment of RM5m was to be recouped in the manner provided in the special provisions to the conditions of contract (additional terms and conditions) as per attachment I, namely

> 'when the cumulative total value of the builder's work executed and certified (including the amount certified for materials on site) in the progress payment certificates reached twenty five (25) percent of the total contract value of builder's work; by way of a fixed percentage deduction from the total certified value of the builder's work executed (including the amount certified for materials on site) during the period covered by progress payment certificates, in all the subsequent progress payment certificates on the basis that the advance payment made shall be fully recovered in the progress payment certificate in which the cumulative total certified value of builder's works executed (including the amount certified for materials on site) reached seventy five (75) percent of the total value of the builder's work.' D E F

The deduction was to be calculated in accordance with the formula proved in the special provisions.

8 It was also expressly provided in the special provisions to the conditions of contract (additional terms and conditions) as per attachment I:

> 'The liability under the bank guarantee shall be terminated upon realization by Warisan Harta Sabah Sdn Bhd of the full sum of advance paid. However if the full sum of the advance paid cannot be realised before the completion date of the contract or any authorised extension thereof or in the case of the contract being determined before the date of the determination, then the balance repayable to Warisan Harta Sabah Sdn Bhd shall be recovered from the bank guarantee.' G H

Hence, the plaintiff took out an insurance guarantee against advance payment (for works) for RM5m issued by the second defendant in favour of the first defendant on 31 December 1997 under Policy No N–7–97–TA–000002 ('the insurance guarantee'). I

And para 11 of Lim's first affidavit summarized the manner in which advance is to be reduced as thus:

> 11 Under the terms of the insurance guarantee against advance payment (for works) the advance payment of RM5.0 million shall be reduced automatically in proportion to the deductions made by the first defendant out of the progress payment due to the plaintiff, the guarantee shall be cancelled immediately after the whole of the advance payment have been realised through payments by the second defendant or through deductions made out of the progress payments due to the plaintiff; or after the expiry of the construction period (2 November 1999), whichever is the earlier.

The first defendant paid the advance to the plaintiff on 16 January 1998.

The plaintiff took possession of the site on 3 November 1997. However, soon after, the parties felt the full impact of the economic downturn that affected the country. And this can be noted from the exchanges of letters between them within the first month of site possession by the plaintiff. In fact by a letter dated 26 January 1998 ('LCO-20' of Lim's second affidavit) the first defendant had already indicated to the plaintiff of its intention of either to extend the period of completion of the project or to stop work and to compensate the plaintiff for the costs it had incurred so far. In reply ('LCO-21' of Lim's second affidavit) the plaintiff opined that the extension of the completion of the project would be a better option. In the interim the plaintiff supplied the first defendant with particulars of some of the potential purchasers either for unit block or office space in the project.

Then, by a letter dated 16 July 1998 ('LCO-6' of Lim's first affidavit and hereinafter referred to as the 'stop work order') the project consultant, Messrs Arkitek Ikhtisas Sdn Bhd instructed the plaintiff to stop work immediately. And the letter went on to state thus, inter alia:

> We were advised that this decision was reached in view of the present uncertainty in the property market, in particular office spaces and the difficulties in securing both bridging and end-financing.

The project consultant also directed the plaintiff to do certain works in relation to the stop work order.

In response to the stop work order the plaintiff ('LCO-8' of Lim's first affidavit) informed the project consultant of its decision to treat the building contract as 'having been determined' by the first defendant. It also gave notice of its intention to submit its claim for all losses and damages suffered by it by reason of the termination.

And on the materials before me there appears to be no reply of the first defendant to the election taken by the plaintiff. Indeed in its letter to the plaintiff dated 8 October 1998 ('LCO-11' of Lim's first affidavit) the first defendant wrote inter alia:

> As per your request, we wish to *re-confirm* that as clearly stated in our letter dated 19 August 1998 and acknowledged by you vide your letter dated 27 August 1998, the stop work order is of a permanent nature. We reiterate that we shall not be liable for any further cost in connection with the stop work order effective after 16 July 1998 save and except those covered under paragraph 4 of our consultant's letter.

By its letter dated 31 December 1998 ('LCO-30' of Lim's second affidavit) the plaintiff submitted its claim for the works done as directed in the stop work order amounting to RM457,814.20. A

And in fact, as at 30 September 1998 the total certified value of work done and paid to the plaintiff in connection with the project was RM 8.2m.

B

The contentions of the parties

At the outset of the hearing learned counsel for the plaintiff made it clear that he was only asking prayer (b) of the summons in chambers. He submitted that prayer (a) would be automatic. Hence, my concern in this judgment is whether there is any triable issue raised thereby disallowing this court from granting prayer (b) summarily. C

And in contending that the first defendant has no defence to the claim of the plaintiff as per prayer (b) of the summons in chambers learned counsel premised his argument on two main points, namely, (1) what was the effect of the stop work order, and (2) whether there was any legal basis in determining/repudiating the building contract. D

In respect of point (1) learned counsel submitted that the effect of the stop work order was a plain and obvious termination/repudiation of the building contract. That, according to learned counsel resulted in the plaintiff being prevented from repaying the advance obtained from the first defendant and satisfying the terms of the insurance guarantee. It also prevented the plaintiff from complying with the terms of the building contract. E

As regards point (2) it was submitted that the first defendant had no legal right to terminate the building contract on the basis of uncertainty in the property market or difficulties in securing bridging and end-financing as there was no such provision in the building contract and it could not be implied relying on the doctrine of frustration. F

On the other hand learned counsel for the first defendant posed four issues, to wit,:

(1) whether in issuing the stop work order the first defendant was repudiating the building contract; G

(2) if so, what would be the loss and damage payable to the plaintiff;

(3) whether the plaintiff was in breach of the building contract in failing to comply with the variation instruction issued by the project consultant pursuant to cl 11; and H

(4) whether the plaintiff is obliged to refund the advance to the first defendant.

On the first issue learned counsel for the first defendant submitted that it was an implied term in the building contract that in the event of any financial or economic crisis happening which questioned the viability of the project the first defendant should be entitled to terminate the plaintiff's employment. I

A She added that the first defendant should be entitled to rely on cl 11 of the building contract under the heading of 'Preliminaries and general conditions of contract' in that in the event of an economic crisis it could omit substantial works in the project.

Learned counsel in referring to the third issue also submitted that the B plaintiff did not comply with the variation order as contained in the stop work order. Meanwhile, I do not think it is necessary to consider the second issue in this application as learned counsel for the plaintiff is only asking for prayer (b) of the summons in chambers. As for the fourth issue in my view it would only be relevant when dealing with the counter claim of the first defendant.

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Findings

In an application under O 14 of the Rules of the High Court 1980, an applicant is only required initially to ensure that all the requirements of that Order have been satisfied in order to establish a prima facie case. It is for the D respondent thereafter to show why no judgment should be entered by way of generally showing that there exist triable issue or issues and thus a bona fide arguable defence has been raised which ought to be tried. In other words it is for the first defendant in this case to show merits of its case, or that it has a good defence to the claim or that a difficult point of law is involved or that the dispute is as to fact which is to be tried or any other E circumstances showing reasonable grounds of a bona fide defence (see *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v Ghazali bin Ibrahim* [1985] 2 MLJ 225).

In the case of *National Company For Foreign Trade v Kayu Rava Sdn Bhd* [1984] 2 MLJ 300, Seah FCJ said this at pp 301–302:

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> We think it appropriate to remind ourselves once again that in every application under O 14 the first considerations are: (1) whether the case comes within the order; and (2) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14 the preliminary requirements are:
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> (i) the defendant must have entered an appearance;
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> (ii) the statement of claim must have been served on the defendant; and
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> (iii) the affidavit in support of the application must comply with the requirements of r 2 of the O 14.
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> It is to be observed that a case is not within O 14 (a) where no statement of claim has been served on the defendant; (b) where the indorsement on the writ H includes a claim or claims outside the scope of O 14 as coming within r 1(2); (c) where the affidavit in support of the application is defective, eg in omitting to state the deponent's belief that there is no defence to the claim or part to which the application relates; (d) where the application is made in an action against the government (O 73 r 5 (1)).
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> If the plaintiff fails to satisfy either of these considerations, the summons I may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a *prima facie* case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him (see O 14 rr 3 and 4(1)).

Now, it is the contention of the plaintiff that the issuance of the stop work order effectively repudiated the building contract. And I am inclined to agree as the first defendant in no uncertain term made it clear that the stop work order would be of permanent nature. In fact, I heard no assertion to the contrary from the first defendant. Its stand is to rely on an implied term and/or cl 11 of the building contract as the justification in the issuance of the stop work order. And the factual reason relied upon for such justification was the prevailing economic downturn. That there was and in fact still prevailing such a situation is not in dispute. Basically therefore the issue is whether it is a valid basis in law.

Having examined the terms of the building contract it is clear that there is no specific provision relating to economic downturn as a reason for an issuance of a stop work order, temporary or otherwise. It is also not specifically stated as one of the grounds for terminating the building contract. Can it be an implied term?

The law on implied term has been discussed quite extensively recently in our courts. In the case of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 the majority of their Lordships adopted the view on implied term as thus at p 169–170:

> Implied terms are of three types. The first and most important type is an implied term which the court infers from evidence that the parties to a contract must have intended to include it in the contract though it has not been expressly set out in the contract. The implied term contended for in this appeal belongs to this type and much more about this later.
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> The second type of implied term is one by operation of law, and not based on the inference just explained. By operation of law, I mean that a large number of specific implied terms have been held to arise from previous decided cases on certain specific facts. Such ratio decidendi in respect of such decided implied terms are normally adopted by courts in subsequent cases on similar facts as a matter of course without the necessity of any court to decide afresh whether it ought to draw the inference as explained above. Thus, such implied terms come from decided cases exclusively. Thus, in a contract of employment, there is an implied term that the employee will serve his employer faithfully, and not to act against the employer's interest, and again there is another implied term that the employer will provide a safe system of work. Many of such decided and specific implied terms have been incorporated into statutes such as the Sale of Goods Act 1957 and others; it is not necessary to discuss it further except to emphasize that such an implied term of this particular type may sometimes be excluded by parties by an agreement to the contrary and more importantly, it is not dependent on the court having to draw an inference explained above.
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> The third kind of an implied term is one that is implied by custom or usage of any market or trade which is reasonable, and again it is not dependent on a court's inference explained above but by virtue of such a custom or usage from the market or trade. Interestingly, s 92(e) of the Evidence Act 1950 seems to be custom-made to provide logistical support for this particular type of implied term. It will be remembered that s 92(e) aforesaid is one of the exceptions to the rule against evidence to contradict or vary any terms of a written contract.

A Reverting to the first type of implied term which is dependent on a court drawing an inference as explained above, there are two tests to fix the parties with such an intention, ie that the parties must have intended to include such an implied term in the contract. The first test is a subjective test, as stated by Mac Kinnon LJ in *Shirlaw v Southern Foundries* (1926) Ltd [1939] 2 KB 206 at p 227, that such a term to be implied by a court is 'something so obvious B that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common 'Oh, of course'.

The second test is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. The test C was described by Lord Wright in *Luxor (Eastbourne) Ltd & Ors v Cooper* [1941] AC 108 at p 137, that in regard to an implied term, '... it can be predicated that 'It goes without saying', some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended'. Business efficacy in my opinion, simply means the desired result of the business in question. Thus, in *Shirlaw*'s case, Shirlaw who was D appointed the managing director by the defendant company for 10 years, sued for and obtained damages for breach of agreement. It was held that it was an implied term that the defendant company would not alter its articles of association to create a right for itself to remove the plaintiff before the 10 year term expired. The implied term inferred by the court there was to let both parties achieve the desired result that the post of the managing director would continue to be available for 10 years to Shirlaw as both parties must have E intended it at the time when making the agreement.

The testy answer to the question of the officious bystander of 'Oh, of course' spoken of by Mackinnon LJ was described equally elaborately by Scrutton LJ in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd & Anor* [1918] 1 KB 592 at p 605 as '... of course, so and so will happen, we did not F trouble to say that, it is too clear'.

Both tests in my opinion must be satisfied before a court infers an implied term. Thus, Lord Wilberforce in *Liverpool City Council v Irwin & Anor* [1977] AC 239 at p 254 spoke of an implied term as a matter of necessity, so that the element of 'business efficacy is inseparable'. Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 16 ALR 363 G described both tests as conditions the compliance of which the court must be satisfied, in addition to what I may describe as other requirements, of existing law. Closer to home, Chong Siew Fai J (as he then was) in *Yap Nyo Nyok v Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250 held that both tests must be satisfied. If the implied term was not necessary to give business efficacy, the answer to the öfficious bystander, would have been a testy answer of 'Oh, H don't talk rubbish'.

The two tests referred to earlier are to enable the court to decide as to whether it should or should not infer that the implied term contended for is a term which parties to a contract must have intended to include in the contract. Such being the case, the intention of both parties from the contract in question ought to be ascertained. In doing so, I will not set out the evidence below in detail except to refer to such parts of it as and when necessary, as after all, this I matter is not likely at all to go elsewhere from this court, as long as the parties and their counsel and the courts below are apprised of detailed facts: per Peh Swee Chin FCJ at p 169.

Now, in contending that an implied term could be invoked learned counsel for the first defendant regrettably did not assist this court by reference to any of the types of implied term mentioned in *Sababumi*'s case. But having read the affidavits filed for the first defendant I think it can safely be said that types one and three as propounded in that case are relevant for consideration.

As regards the first type, can this court infer from the evidence that the parties to the building contract must have intended to include as a term the effect of an economic downturn in their relationship even though it has not been expressly set out in the building contract? I think the answer to this question may be deciphered from the surrounding circumstances and what transpired between the parties prior to and on the execution of the building contract.

From my examination of the relevant materials before me, I find it difficult to accept that the first defendant was not aware of the economic situation when the building contract was executed on 17 January 1998. Indeed judicial notice can be taken that the economic woes of the country began well within the second part of 1997 at the latest. Hence there was ample opportunity to state the obvious if that was one of the primary considerations in the minds of the contracting parties. In this case there was no reference whatsoever, not even obliquely. It was only after the execution that the first defendant indicated its intention as per 'LCO-20' dated 26 January 1998 of Lim's second affidavit. That letter reads, inter alia:

> We fully agree with you that the implementation of the above-mentioned project has been badly affected by the current economic turmoil, particularly in relation to its marketability and the reservations of most financial institutions in providing both bridging and end-financing. In fact, we strongly feel that we need to review the implementation of the project. One of the possible lines of action that is open to us is to slow down its implementations so that its completion date can be synchronized with the nation's economic recovery. In effect, this means giving you extension of time of say 1 to 2 years or even longer period to complete the project. Alternatively, we may have to ask you to stop work and to compensate you for the costs you have incurred so far on the project. In this connection, could we have your response and views on these options in your capacity both as the contractor and the marketing manager for the project, please.

Accordingly, I do not think it can be said that the parties must have intended to include economic downturn as a factor that could be a basis for the repudiation of the building contract. Indeed 'LCO-20' reflects the realization by those managing the first defendant of a grave misjudgment in launching the project. As such, in this case, I do not think it has been satisfied on the balance of probabilities the generally accepted subjective test whereby a term to be implied by the court is 'something so obvious that it goes without saying, so that if' while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common 'Oh, of course'. Neither is the test of business efficacy that is premised on the concept that some terms though 'not expressed but necessary to give the transaction such business efficacy as the parties must have intended' has been overcome.

A Thus, for the foregoing reasons I would rule out the relevance of the first type of implied term as described hereinabove.

The second type is not applicable on the facts of this case.

And as to the applicability of the third kind of an implied term, that is implied by custom or usage of any market or trade which is reasonable, I am
B also of the view that it is not judging from the materials before me. It is inconceivable that for a project of this magnitude the parties would have left such a crucial matter as its financing to be implied by custom or usage of the market or trade that is reasonable.

Hence, the reliance on implied term principle by the first defendant as
C a justification in the issuance of the stop work order fails. Hence, I find no triable issue arising thereof.

As regards the reliance on cl 11 of the building contract under the heading of 'Preliminaries and General Conditions of Contract', I think it is a matter of interpretation of that clause. It reads:

D > The architect may in his absolute discretion omit any part of the works from the contract. No such omission required by the architect shall vitiate this contract. The prices in the bills of quantities shall determine the valuation of items omitted. The contractor will not be entitled to any remaining items of work carried out under conditions substantially varied by such omissions.

In rebutting the scope of cl 11 as all encompassing learned counsel for the
E plaintiff submitted that the clause did not give the architect or the project consultant the right to omit the entire works. He added that the plaintiff accepted the stop work order as a variation order for additional works. And he referred to the commentary in the *Malaysian Standard Form of Building Contract* by Prof Vincent Powell-Smith on cl 11 at p 41 that reads thus:

F > Despite the width of this definition it imposes limitations on the architect's power which is limited to ordering variations as here defined. *Under the general law, for example, the power to vary by way of 'omission or substitution' does not enable the architect to omit the work in order to give it to another contractor.* The instruction must be one for a genuine omission, ie something to be omitted entirely from the works. (Emphasis added.)

G But it should be noted that the comment is not directly on a cl 11 under the heading of 'Preliminaries and General Conditions' but on cl 11 of 'Conditions of the Standard Building Contract'.

Learned counsel for the first defendant on the other hand argued that the cl 11 thereto provides the right to omit substantial works in the project
H in the event of a financial crisis. *Hudson's Building and Engineering Contract* by IN Duncan Wallace QC was quoted at pp 906–907 that opined:

> The contractor, however, is entitled to perform all the contract work, so that a provision giving the owner or his A/E a power to make omissions only contemplates genuine omissions, that is, work which it is intended should not
I be carried out at all. The owner will generally not be entitled to use the power to omit work from the contract works in order to give it to another contractor to do, or to do the work himself, whether under a provision similar to the above clause or otherwise.

> However, it would not, it is submitted, be correct to apply this principle automatically and legalistically in every case merely because it is intended to have omitted work done ultimately by other contractors. For example, where market considerations impel the owner to postpone part of the work for an indefinite period, although with the intention of carrying it out at some later date outside the likely construction period, or in a case where the present contract is straining the contractor's available resources to the limit, the omission of work in such circumstances might be within the contemplation of the contract, it is submitted, since the invalidation of an exercise of the power to omit work is no doubt based on the generalized prevention principle or implied terms of reasonableness, co-operation and good faith.

Leaving aside the commentaries for the moment I do not think cl 11 under the heading of 'Preliminaries and General Conditions' can be given such a wide interpretation as the first defendant would want it to be. In fact in the first place there was no denial by the first defendant that with the issuance of the stop work order it would mean the termination of the employment of the plaintiff. Yet it is also provided in cl 11 that 'no such omission required by the architect shall vitiate this contract.' As such I do not think it was intended that the invocation of cl 11 by the architect/project consultant would be wide enough as to include the omission of the balance of the works in the project thereby effectively terminating the building contract. Otherwise that would make the determination clause therein quite superfluous. At any rate there is nothing stated in the determination cl 25 of the building contract that indicates an overriding or at least an equal effect of cl 11 thereof.

As regards the opinion expressed in *Hudson* I do not think it is relevant in the present case in view of my reasons in refusing to consider an economic crisis as an implied term in the building contract. After all it would be ludicrous to say that the first defendant was totally caught unaware of the economic turmoil when it executed the building contract thereby entitling it now to raise the fact of adverse market condition as a reason. And in any event there was no dispute that the commercial/office spaces arising from the project would substantially be for the use of the first defendant and its subsidiaries or related organizations. Hence, market consideration would not have been that crucial in this case unlike the situation that might have been envisaged by the author of *Hudson*. And by the same token I would say that the issue of a package deal as raised by the first defendant has no merit. Accordingly, I find that the points raised hereinabove do not constitute triable issues thereby requiring a full hearing in respect of prayer (b) of the summons in chambers.

There is also the doctrine of frustration raised in the defence but I heard no submission on it coming from learned counsel for the first defendant. Anyway, I am inclined to agree with learned counsel for the plaintiff that for the doctrine of frustration to set in it occurs whenever 'the law recognizes that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract' (see *Davis Contractors v Fareham*

A *UDC* [1956] 2 All ER 145.) In the instant case I find no material before me indicating that the economic crisis has the effect of rendering the construction of the project radically different from that that was undertaken by the building contract. Indeed it was by choice of the first defendant not to proceed with the project. There is therefore no question of absence of default by either party, a prerequisite for the doctrine of frustration to apply.
B Moreover, as stated earlier, it is not as though the economic downturn was never anticipated. At the time of execution of the building contract there was no doubt that the full force of crisis had already become a daily event. Thus the doctrine of frustration of contract is a non-issue in this case, implied or otherwise.

C In respect of the other points raised by learned counsel for the first defendant such as the failure of the plaintiff to comply with the cl 11 notice in terms of the works to be done and the delay in the submission for compensation, I do not think they are of any relevance in considering whether there is any triable issue thereby requiring a full trial in so far as prayer (b) of the summons in chambers is concerned. As for the
D counterclaim of the first defendant it does not necessarily provide a triable issue contrary to the contention of its learned counsel. Summary judgment may still be given notwithstanding the filing of a counterclaim (see *Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan* [1993] 2 MLJ 423).

E *Conclusion*

As I find that the first defendant has not shown any triable issue thereby disallowing this court from summarily granting prayer (b) of the summons in chambers the inevitable conclusion is that I should grant it as prayed. Costs to the plaintiff to be taxed unless agreed.

F Be it noted that this judgment does not conclude this action. There is still the counterclaim of the first defendant and other ancillary prayers of the plaintiff. The parties may wish those to go for trial.

Postscript

G This judgment could not be delivered earlier awaiting for my next circuit to Kota Kinabalu. Fortunately the parties have now agreed to receive it in Sandakan and hence this delivery.

Order accordingly.

H Reported by Moy Saw Han

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